No. 3955

United States

Circuit Court of Appeals

For the Ninth Circuit

G. TRAVERSI,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

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BRIEF FOR PLAINTIFF IN ERROR.

Plaintiff in Error, jointly with one Pete Taro, was informed against by the United States Attorney for the Northern District of California; the information charging him with violation of the National Prohibition Law on two counts.

First: with maintaining a common nuisance at 115 I Street, Sacramento, California, in that he wilfully and unlawfully kept for sale on such premises intoxicating liquor, namely: 1 quart bottle 1/3 full of red wine containing one-half of one per cent of alcohol by volume fit for use for beverage purposes, in violation of Section 21, of Title II of said Act (p. 3, record).

Second: with unlawfully possessing, at 115 1 Street, Sacramento, intoxicating liquor, namely: 1 qt. bottle 1/3 full red wine, containing one-half of one per cent of alcohol by volume fit for use for beverage purposes, in violation of Section 3 of Title II of said Act (p. 4, record).

To this information plaintiff in error pleaded not guilty (p. 7, record). After trial, the jury brought in a general verdict of guilty against plaintiff in error (pp. 9 and 10, record), and thereafter the Court pronounced and entered its judgment, and sentenced plaintiff in error to pay a fine of $500.00 and to be imprisoned for 3 months, and, in default of the payment of said fine, that he be imprisoned for a further period of 5 months, such periods of imprisonment to run concurrently (pp. 11 and 12, record).

From this judgment plaintiff in error sued out a writ of error to this Court (p. 14, record); and with his petition for such writ, he filed with the Clerk of the District Court an assignment of errors (pp. 15-21, record).

A writ of error was allowed by the District Court (p. 40, record).

The only evidence (p. 32, record) adduced at the trial is as follows:

Plaintiff in error is the proprietor of and conducts a hotel at 115 I Street, Sacramento, (p. 30, record). On April 5, 1922—the date mentioned in the information—three federal prohibition agents, V. H. DeSpain, W. W. Greer and one named

Wrinkle, entered the premises in question, denominated by Greer as an "old fashioned saloon premises," (testimony of DeSpain, p. 24, and of Greer, p. 26, record). At that time the defendant Taro was the only defendant there (testimony of DeSpain, p. 24, of Greer, p. 26, record). Taro was serving two patrons with what DeSpain referred to as "beer," but who, on cross-examination, stated that he thought it was "near beer," and that was the only liquor of any kind that was served (testimony of DeSpain, p. 25, record). Greer, who entered the premises behind the two other agents did not see anything served. He saw Taro, who had his coat off, and "appeared to be bartender, in the act of waiting on the bar," and who "was standing at the end of the bar" (testimony of Greer, p. 26, record). He did not see Taro handling any intoxicating liquor or anything else (testimony of Greer, p. 28, record).

While the agents were in the bar-room, plaintiff in error entered with a bottle of red wine in his hands, which Agent DeSpain took from him and handed it to Agent Greer (testimony of DeSpain, p. 25, of Greer, pp. 26 and 27, record).

His entrance is described by the witnesses as follows:

"At the end of the bar there was a door that leads into a hallway and then upstairs, and he came through that doorway with a bottle of wine in his hands" (testimony of DeSpain, p. 25, record).

While Greer testified:

"I saw him coming out through this door at the

end of the bar; into behind the bar"; and in answer to questions by the Court, he said: "The door is behind the bar, at the end of the bar next to the street. I did not go through that door." Mrs. Traversi, the wife of the defendant, was present (pp. 27 and 28, record).

The contents of the bottle taken from plaintiff in error consisted of red wine, containing nine and seven-tenths per cent alcoholic content by volume" (testimony of A. D. Etienne, p. 28, record).

Agent Greer made search of the premises, and found no other liquor (testimony of Greer, p. 28, record).

Possession of the wine is accounted for by plaintiff in error and the use to which he intended to put it is stated by him as follows:

Q. "Will you please state to the jury the circumstances of your having the red wine?" A. "Yes, I have it. I got it to take lunch, and when I came in I said, 'I go get a little bit of wine,' and when I came back my wife says, 'Go and get a little wine and I will fix lunch'; and I go to my room and I take half a bottle of wine, and then I come down. When I reached the door the man here grabbed me." I am in the habit of using wine with my meals. I like wine. On that day I do not eat at all. I do not keep liquor in my premises for sale. Q. "The liquor then that you had there—how long had it been there?" A. "I got it just for myself when I want to eat." (pp. 30 and 31, record).

On cross-examination he was asked what meal he was going to eat with that bottle of wine, and re-

plied: "I tell you, I had some sausage, I took some of that sardinia and lots of things. It was lunch." Q. "What time do you usually eat lunch?" A. "At that time I don't remember what time. I came from the country. I stay about seven miles out. I come just at that time. Maybe half-past three or four o'clock. I eat regular at twelve and six, but that day I don't remember what time. On that day it was late. It was half-past three or four o'clock. I don't remember."

To the Court: J. Boizone was running the bar when I was not there. At that time when the federal agents came in, I was tending bar myself. When I came in with the bottle I was tending bar (pp. 31 and 32, record).

Pete Taro, the co-defendant of plaintiff in error, testified:

On April 5, 1922, on the occasion of the federal agents' visit to those premises, I was boarding at the hotel 115 I Street. Mr. Traversi and wife going to eat but never got to eat. He got that red wine to go and eat. He was sick at that time, and the dry agent jumped and grabbed Mr. Traversi. Q. (by the Court): "Where did you get the red wine did you say?" A. "He was behind the door. He was just going to eat. Mr. Traversi had it. I don't know where he got it. He was sick at the time and was going to eat."

THE QUESTIONS INVOLVED HEREIN ARE:

1. The second count of the information does not state a public offense, and is insufficient to sustain a

conviction. Assignment of errors 7, 8, 9, (p. 16, record).

2. There is *no* evidence to sustain a conviction upon the first count of the information.

3. The Court erred in its charge to the jury.

Assignment of errors 10, 11, 12 (pp. 16-21, record).

4. The Court erred in entering judgment and imposing sentence upon the verdict of guilty in the manner and form as done.

Assignment of errors 13 (p. 21, record).

5. The Court erred in pronouncing judgment upon said verdict.

Assignment of errors 14 (p. 21, record).

6. Both counts of the information are based upon the same identical facts, and plaintiff in error cannot, under the law, be convicted on *both*.

7. In a criminal case, where the liberty of the person is at stake, the Court may and should consider plain error, vital to the defendant, notwithstanding the points involved were not presented to the trial Court by demurrer, or motion in arrest of judgment, nor by exception, and are not specified in the assignment of errors.

SPECIFICATION OF ERRORS RELIED ON BY PLAINTIFF IN ERROR.

1. The second count of the information does not state a public offense, and is insufficient to sustain a conviction, and the Court had no jurisdiction to render judgment thereon.

2. There is no evidence to sustain a conviction upon the first count of the information.

3. Both counts of the information are based upon the same identical facts, and therefore plaintiff in error cannot be convicted on both.

4. The Court erred in its charge to the jury, in this:

a. The first count of the information charged plaintiff in error with maintaining a common nuisance, by unlawfully keeping intoxicating liquor fit for use for beverage purposes, for *sale,* and in its charge to the jury defining a common nuisance the Court omitted the element of keeping liquor *for sale,* and also that such liquor must be fit for use for beverage purposes.

The portion of the charge complained of is as follows, (p. 32, record):

> "The first count of this information charged the defendants with maintaining a common nuisance, and a nuisance under this Act is defined thus, 'Any room, house, building, boat, vehicle, structure or place where intoxicating liquor is manufactured, sold, kept, or bartered in violation of this title, and all intoxicating liquor and property kept and used in maintaining the same, is hereby declared to be a common nuisance.' That is, it simply means that where liquor is kept in a building or structure where it is not permitted to be kept under the Prohibition Act, the maintaining of it is deemed to be for illicit and illegal purposes and it constitutes what is denominated a common nuisance."

This instruction is also erroneous for the reason

that it informed the jury they could conclude the liquor was kept on the property for any illegal and illicit purpose, even though they should determine it was not kept for sale; and that under such circumstances they might convict plaintiff in error on the first count.

b. The Court in said charge further instructed the jury (pp. 32-33, record):

> "Now under the National Prohibition Act one may keep liquor in their private dwelling or on premises that are devoted solely to the use by them of a private dwelling liquor for their own use and consumption and that of their family but not otherwise. Any liquor that is maintained in a place which is not exclusively the residence, although the parties may live upon the premises, if it is devoted partly to use as a saloon or soft drink place, or a hotel or any other than exclusively as a private dwelling, the maintenance of liquor there is not permitted under the law."

In this portion of the charge the Court presumed to pass upon the question of fact that plaintiff in error kept or maintained intoxicating liquor on the premises, notwithstanding there was *no* evidence of that fact.

This charge was further erroneous, in that it informed the jury that no liquor was permitted to be kept in a hotel, even though *some* portion thereof was devoted *entirely* to residence purposes.

c. The Court in its charge instructed the jury

that the prima facie presumption that when liquor is kept in a place unauthorized under the law, it is so kept for sale, cannot be rebutted by evidence, though it may be true, showing that it was kept, not for *sale,* but for some other unlawful purpose. The portion of the charge referred to reads (pp. 18 and 19, record):

> "It is true as the United States Attorney suggests that it is not necessary under this Act that it be shown that any positive sale or dispensing of liquor was going on at the time provided it is shown that there was liquor maintained on the premises. Section 33 of the Act provides: 'After February 1, 1920, the possession of liquors by any person not legally permitted under this title to possess liquor shall be *prima facie* evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished or otherwise disposed of in violation of the provisions of this title.' In other words where liquor is found upon premises that are not of the character of those described in the Act as being such that people are entitled to keep liquor there, then that very fact raises the presumption and is prima facie evidence that it was there for an illegal purpose under the law. As I say the only place where liquor is permitted to be maintained under the Prohibition Act is one's private residence, premises devoted solely to the occupation and use as such. It is true that where one lives at a hotel or lives

in a flat, or lives in apartments, exclusively devoted to the purposes of residence he may keep and maintain liquors in those premises so occupied by him, but he is not at liberty to carry it out of those premises or take it out for the purpose of going elsewhere and enjoy it with his meals. For the purpose of the law is to suppress the public consumption and maintenance of liquors that are prohibited under this Act so that the law shall not be subject to any pretense that it is being used under such circumstances solely for the use of the parties. If the defendant Traversi is testifying truthfully that he was taking this with him to some place where he was going to have his lunch he would be violating the law because if he maintained it in a room occupied by him as a private residence he would be entitled to have it there and serve his family there, but not permitted to take it off the premises."

This portion of the charge is also error, because it informed the jury that no person is permitted, under the law, to remove intoxicating liquor from one place where he has a right to keep it to some other place where he may lawfully consume it.

d. The Court erred in charging the jury they might conclude, from the fact that liquor was brought into a place, illegally, at one time, it was also so brought there on other occasions. The portion of the charge here referred to states (pp. 37-38, record):

"You are entitled to draw reasonable deduction from the evidence that is before you and determine whether if liquor was brought there at one time in an illegal way it was not brought there for the same purpose on other occasions. It is a question of fact for you."

THE SECOND COUNT OF THE INFORMATION SHOWS THAT PLAINTIFF IN ERROR HAS VIOLATED NO LAW, AND THAT HE WAS GUILTY OF NO OFFENSE, SO FAR AS THAT COUNT IS CONCERNED; AND SAID SECOND COUNT IS INSUFFICIENT TO SUSTAIN A CONVICTION.

This count reads:

"That G. Traversi and Pete Taro" * * * did then and there wilfully and unlawfully *possess* certain intoxicating liquor, to-wit: 1 Qt. Bottle 1/3 full red wine then and there containing one-half of one per cent or more of alcohol by volume which was then and there fit for use for beverage purposes."

"That the possession of the said intoxicating liquor by the said defendants at the time and place aforesaid was then and there prohibited, unlawful and in violation of Section 3, Title II of the Act of Congress of October 28, 1919, to-wit, the National Prohibition Act" (p. 4, record).

This count charges plaintiff in error with the *mere possession* of certain intoxicating liquor, and not that he possessed the same for the purpose of its being sold, etc., nor that such liquor was intended for use in violating Title II of the National Prohibition Act, the only offenses relating to the "pos-

session'' of intoxicating liquor Congress is authorized to prescribe.

Eighteenth Amendment to the Constitution.
Section 33, *Title II, National Prohibition Act,* 41 Stat. 305.
United States v. Dowling, 278 Fed. 630, pp. 637-640.
Street v. Lincoln Safe Deposit Co., 254 U. S. 88, pp. 92, 94, 95; 65 L. Ed. 151.

That this is the construction that should be placed upon the National Prohibition Act is apparent; for the reason that the police power of Congress to legislate regarding intoxicating liquor, coming, as it does, from the Enghteenth Amendment, is limited to enforcing the prohibition of "the *manufacture, sale* or *transportation* of intoxicating liquors within, the *importation* thereof into, or the *exportation* thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes."

Tenth Amendment to the Constitution.
Slaughter House Cases, 16 Wall 36; 21 L. Ed. 394, p. 404.
U. S. v. DeWitt, 9 Wall. 41; 19 L. Ed. 593.
Hamner v. Dagenhart, 247 U. S. 251, p. 275; 62 L. Ed. 1101, pp. 1106 and 1107.

As was said by Mr. Justice Clarke, in *Street v. Lincoln Safe Deposit Co.,* 254 U. S. 88 (pp. 90 and 91): "Title II of the Volstead Act was passed un-

der the grant of power to enforce the 1st Section of the 18th Amendment to the Constitution of the United States, which prohibits the manufacture, sale, and transportation of intoxicating liquors for beverage purposes."

While in the Clarke Street case the only question involved was the right to *store* liquors which were not being kept for the purpose of sale, barter, exchange, furnishing or otherwise disposed of in violation of the provisions of the title (namely Title II); yet the language of the opinion in holding that the inhibition against "keeping" intoxicating liquor found in Section 21 of Title II of the Act, implied keeping "for sale or barter, or other commercial purpose" (see p. 92), is equally applicable to the prohibition against the "possession" of such liquor mentioned in Section 3 of the same title, and the possession therein referred to means a possession thereof "for the purpose of its being sold, bartered, exchanged, given away, furnished or otherwise disposed of in violation of the provisions" of such title, as provided in Section 33 of Title II, quoted in the opinion (p. 94).

In his concurring opinion (p. 95), Mr. Justice McReynolds is emphatic in his statement that under the 18th Amendment, it was only the manufacture, sale and transportation that was prohibited—not personal use.

In *United States v. Dowling,* 278 Fed. 630, the District Court for the Southern District of Florida passes upon this identical question; and while it is not contended that the decision is binding upon this

Court, the reasoning of the District Judge is persuasive, and worthy of consideration.

After pointing out that the alleged offense charged —as here—is the bare possession of intoxicating liquors, and that no accompanying facts are alleged to show that such possession was unlawful either on account of the time, place or purpose of the possession, and quoting and commenting upon the amendment in question to the Constitution, Judge Clayton says, (p. 637):

"However, I think the Congress has the power to prohibit the possession of intoxicating liquors, if the possession is inhibited for the purpose of rendering effective the expressed prohibitions of the amendment; but the Congress cannot do this for the purpose of adding a new prohibited act to the fundamental law. It is clear that the Congress is without authority to make the mere possession of intoxicating liquors—possession stripped of every other fact or incident—a crime. The amendment neither by expression nor implication denounces the simple possession of intoxicating liquors. The possession is lawful unless it be coupled with the illegal 'manufacture' or 'sale' or 'transportation' or 'importation' or 'exportation.' "

On p. 638 the opinion continues:

"In the instant case, the liquors may have been in existence before the adoption of the amendment, and for aught that appears from the indictment they may have been in existence at such prior time. The offense which the defendants are conspiring to commit is the possession of liquors disconnected with any

facts charging the manufacture, sale, transportation, importation, or exportation in violation of the law, or any intention or purpose to possess or use them in violation of the law. The indictment, in that it charges nothing more than the bare possession of intoxicating liquor, is defective."

The opinion then quotes Section 33, and then says:

"This section does several things. It prescribes a rule of evidence where possession of the liquor is shown on the trial; it requires every personally legally permitted to have liquor to report to the commissioner, etc., and then proceeds to say:

'But it shall not be unlawful to possess liquors in one's private dwelling * * * for the personal consumption of the owner thereof and his family * * * and of his bona fide guests when entertained by him therein.'

—and puts the burden of proving that such liquors were lawfully acquired, possessed and used on the possessor. But the act cannot be said to denounce possession, isolated from all other facts or circumstances as an offense. And if it did it would exceed the power conferred upon the Congress by the Eighteenth Amendment, and to that extent would be void."

The affidavit of D. D. Simpson, upon which the information was based (pp. 5 and 6, record) does not in any way strengthen this charge in the information. The only direct statement of any *fact* regarding the *possession* of intoxicating liquor by the defendants mentioned therein is that on the day and at the place referred to in the information G.

Traversi and Pete Taro "did then and there *possess* certain intoxicating liquor, to-wit: 1 Qt. bottle 1/3 full of red wine then and there containing one-half of one per cent or more of alcohol by volume which was then and there fit for use for beverage purposes" (p. 6, record).

It is true that this affidavit further states:

"That the keeping for sale of the said intoxicating liquor by the said defendant was then and there prohibited, unlawful and in violation of Section 3 of Title II of the Act of Congress of October 28, 1919, to-wit, the 'National Prohibition Act.' "

This statement is but a mere *conclusion* of the affiant, and not a direct affirmation of any fact. See *United States v. Hess,* 124 U. S. 483; 31 L. Ed. 124, where the Court, through Mr. Justice Field says: "The charge must be made directly, not inferentially or by way of recital." Besides which, the only statement in the affidavit to which this clause *could* refer is that found in the first portion thereof, that defendants "did then and there *keep for sale* on said premises certain intoxicating liquor," etc. (p. 5, record).

It follows, therefore, that the second count of the information does not charge plaintiff in error with any offense whatever, known to the law, nor does it show that he had violated the law, or that he was guilty of any offense, and that such second count is insufficient to sustain a conviction.

Plaintiff in error is familiar with the decision of this Court in *Page v. United States,* 278 Fed. 41, and that of the Circuit Court of Appeals for the Sixth

Circuit, in *Rose v. United States,* 274 Fed. 245; and respectfully submits that, inasmuch as Federal criminal statutes, especially those that create a new offense, must be *strictly* construed, so long as such a construction does not frustrate the *obvious* legislative intent, as held in *St. Louis Merchants' Bridge Terminal Co. v. United States,* 188 Fed. 191, and *United States v. Corbett,* 215 U. S. 233, and seeing that the intention of Congress in enacting the National Prohibition Act was to carry out the mandates of the Eighteenth Amendment for its enforcement, and also that only *such* possession as is not authorized by the Act is thereby made unlawful, an information charging a defendant with the unlawful possession of intoxicating liquor should, *at least* inform such defendant wherein such possession was unlawful, so that he might be appraised with all necessary certainty of the crime with which he stands accused and of the nature and cause of the accusation, and also to inform the Court that the acts charged will support a conviction.

Sixth Amendment to the Constitution.
United States v. Cruikshank, 92 U. S. 542; 23 L. Ed. 588, 593, 594.
United States v. Carney, 228 Fed. 163, 165, 166.
Keck v. United States, 172 U. S. 434, 437; 43 L. Ed. 505, 507.
United States v. Boasberg, 283 Fed. 305, 312.

It may be contended by the United States Attorney, that inasmuch as plaintiff in error neither demurred to the information, nor made a motion in

arrest of judgment, he will not be permitted, in this proceeding, to raise the question of the sufficiency of the information to state a public offense.

Plaintiff in error has endeavored to demonstrate not so much that the second count of the information fails to state any offense, but that it states no offense whatever, and shown *affirmatively* that he has committed none, and that he has violated no law; for *possession* of intoxicating liquor is permitted to every person, and all persons are presumed to be innocent of crime.

As neither the National Prohibition Act, nor any other federal statute makes the mere "possession" of intoxicating liquor an offense, there is no penalty provided by law for the naked possession by any person of such liquor; and when plaintiff in error was sentenced by the District Court upon a verdict of guilty on the second count of the information, that Court was without jurisdiction to render judgment against him, so far as the second count was concerned, for the reason that the acts set forth in such second count do not constitute an offense against the National Prohibition Act, or against any other federal statute, and for the further reason that the law provides no punishment whatever for the doing of the acts therein set forth; and that, therefore, that portion of the judgment—whatever it might have been—was void upon its face, and could have been attacked collaterally upon *habeas corpus,*

Mackey v. Miller, 126 Fed. 161, p. 163,

and, therefore, also directly, by writ of error.

THE EVIDENCE IS INSUFFICIENT TO SUSTAIN A CONVICTION UPON THE FIRST COUNT OF THE INFORMATION.

Plaintiff in error is charged in this count with maintaining a common nuisance at 115 I Street, Sacramento, California, in that he did keep for sale on said premises certain intoxicating liquor, namely, 1 Qt. bottle 1/3 full of red wine containing one-half pe rcent or more of alcohol by volume, which was then and there fit for beverage purposes (p. 5, record).

While the language of this count is "keep for sale on the premises", and not "keep on the premises for sale", there can be no question but what it must be construed to mean "keep on the premises" namely 115 I Street, Sacramento, California, for sale; for Section 21 of Title II of the National Prohibition Act, defining a common nuisance thereunder, reads, "Any room, house, building," etc., "where intoxicating liquor is kept" * * * "is hereby declared to be a common nuisance, and the Supreme Court, in *Street v. Lincoln Safe Deposit Co.,* 254 U. S. 88, has construed the word "kept" as used in that section, to mean "kept for sale or barter, or other commercial purpose. So it became incumbent upon the prosecution, before plaintiff in error could be convicted upon this count, to prove that said plaintiff, at the time stated therein *kept* such liquor *on the premises* at 115 I Street, for sale. The evidence discloses that neither at the time mentioned, nor at any other time, did plaintiff in error *keep* said or any liquor *on said premises,* either for sale, or otherwise.

The work "keep," when used as a verb, is synonymous with "maintain," and contains the idea of continuity and permanancy.

Century Dictionary.
New Standary Dictionary.
Encyclopaedic Dictionary.
United States v. Smith, 4 Cranch C. C. 659; 27 Fed. Cas. 1155.
Clute v. Clintonville, 144 Wis. 638; 129 N. W. 661, p. 663.
London & Lancashire Fire Insurance Co. v. Fisher, 92 Fed. 500.
State v. Lawson, 239 Mo. 591; 145 S. W. 92 p. 96.
Commonwealth v. Patterson, 138 Mass. 498 p. 500.
United States v. Dowling, 278 Fed, 630 p. 643.

In defining the word "keep" as used in a statute prohibiting the "keeping" of a common gaming table, Judge Cranch, of the Circuit Court of the District of Columbia, (*United States v. Smith, supra*) says:

"Where shall we look for authorities to settle the meaning of this most significant term, upon the true construction of which depends the fate of several unhappy beings now in jail? Shall we seek them in common usage? That is in favor of the meaning I contend for. Shall we go to dictionaries, to the best expositions of the term keeping, by the best lexographers? They support my definition. Shall we seek for illustrations from parallel and correspond-

ing words in other languages? They sanction the definition I have given it, namely: take the Latin language, the verb 'sustenare' is the nearest, nay the true corresponding word in that language to the word 'keep.' This word is translated by Ainsworth, the highest authority, to 'sustain' or 'maintain' and what English scholar will give a meaning to those words implying only a moment's or even an hour's duration." * * * * * * *

"To return to the word 'keeping.' If the word implies exclusively, when unattended with other restraining adjuncts or explanatory words, what I have stated above, if it was never known, in common use to have any other meaning, nor according to the expositions of the best dictionaries, illustrated by parallel and corresponding words in other languages, no other meaning can be ascribed to it, shall we force it to a meaning thus denied it by common use, and such authorities, in order to convict the prisoner, and send him to the wretched confinement of the penitentiary, because, to our more cultivated minds and more improved moral sense, he has indulged in practices which shock our feelings?" * * * * * * * "But the law says, whoever shall 'keep a faro bank or gaming table,' without any words of limitation. Now why should we be thus astute in seeking to bring the traverser within the formidable penalty of the statute, by resorting to an unusual, forced and unauthorized construction of a single term or expression, on the true import of which his fate hangs?"

Among the definitions of the verb keep, given by lexographers, are the following:

"To have habitually in stock or for sale."

"To maintain, carry on, as the establishment of a business, etc., conduct, manage, as to keep shop."

"To maintain habitually."

Century Dictionary, paragraphs 8, 11, 19.

"To have a supply of for sale, to be in the habit of selling, as to keep butter, etc."

Encyclopaedic Dictionary.

Synonyms: "A person keeps a shop * * keeps or carries a certain line of goods."

New Standard Dictionary.

In *London & Lancashire Fire Insurance Co. v. Fisher,* 92 Fed. 500, Judge Taft held that the carrying of gasoline through a store, in which goods were stored, for immediate delivery to customers, did not violate an insurance policy on such goods, which policy provided it should be void if gasoline "be kept, used or allowed" on the premises; the contention being that the insured, under these facts "allowed" gasoline on the premises. While it was admitted that the carrying of gasoline through the store, without leaving it there permanently, did not come within the adjudicated meaning of the term "kept," the reasoning of Judge Taft clearly indicates that if such act was not "allowing" the gasoline on the premises, it could not have amounted to keeping it there.

In *United States v. Dowling,* 278 Fed. 630, defendant was charged with maintaining a common nuisance under the National Prohibition Act, the lan-

guage of the indictment being, (p. 641) "Defendants" * * "did keep—cases of intoxicating liquor on board a certain boat."

The Court, in passing upon a demurrer to this count of the indictment, intimated, and properly so, that it was insufficient, in that it did not charge that the liquors were kept for sale, discusses the meaning of the word "keep" as used in Section 21, Title II of the Act, saying, (p. 643):

"But in addition to the foregoing, there is no showing that the intoxicating liquors were kept in a manner violative of the Act, or in such manner as to come within the definition of a nuisance as contained in Section 21, but the allegations which should be present to show 'maintenance' were also wanting. The word 'maintenance' implies continuance, and the Act implies it from the use of the word 'keep.' The meaning of these words was passed upon in the case of *Commonwealth v. Patterson,* 138 Mass. 498, 500, where the following language was used with reference to a liquor nuisance:

> 'The proprietor of a building cannot be said to 'keep or maintain' a common nuisance, within the meaning of Pub. St. C. 101, 56, making a building used for the sale of intoxicating liquors a nuisance, on the strength of a single casual sale, made without premeditation in the course of a lawful business. The words 'keep or maintain' import a certain degree of permanence.'

No facts are alleged in these counts of the indictment showing, or tending to show, a keeping or maintaining, or any other status from which permanence could be inferred."

Tested not only by the foregoing definitions and applications by the Courts of the word, but also by the common acceptation of its meaning and significance, there is *absolutely no* evidence in the record that plaintiff at any time "kept" any intoxicating liquor whatever on the premises 115 I Street, either for sale, or otherwise, and no evidence that such premises ever were a common nuisance. Indeed this Court has intimated, in *Page v. United States,* 278 Fed. 41, on p. 45, that a single unlawful act of possession is insufficient to constitute the building in which it is possessed, a common nuisance.

The evidence, as heretofore set out, merely shows that plaintiff in error entered the bar room of the hotel through a door "at the end of the bar next to the street," as testified to by Greer (p. 27), "that leads into a hallway and then upstairs," as described by DeSpain (p. 25, record) with a bottle of wine in his hands, which DeSpain took from him (testimony of DeSpain, p. 25, and of Greer, p. 27, record).

Consequently the wine in question was never, even for an instant, stationary on the premises, and could not have been 'kept' there by plaintiff in error; and said premises, so far as the testimony shows, was at no time a common nuisance.

This is reversible error, although no request was made for a directed verdict.

Wiborg v. United States, 163 U. S. 632, p. 658; 41 L. Ed. 298.

Felder v. United States, 227 Fed. 832, 833.

THE COURT ERRED TO THE PREJUDICE OF PLAINTIFF IN ERROR IN ITS CHARGE AND INSTRUCTIONS TO THE JURY.

The Court charged the jury as follows, (pp. 32-33, record):

> "The first count of this information charges the defendants with maintaining a common nuisance, and a nuisance under this Act is defined thus, 'Any room, house, building, boat, vehicle, structure, or place where intoxicating liquor is manufactured, sold, *kept* or bartered in violation of this title, and all intoxicating liquor and property kept and used in maintaining the same, is hereby declared to be a common nuisance,' That is, it simply means that where liquor is kept in a building or a structure where it is not permitted to be kept under the Prohibition Act the maintaining of it is deemed to be for *illicit* and *illegal* purposes and it constitutes what is denominated a common nuisance. Now under the National Prohibition Act one may keep liquor in their private dwelling on premises that are devoted solely to the use by them of a private dwelling, liquor for their own use and consumption and that of their family but not otherwise. Any liquor that is maintained in a place which is not *exclusively* the

residence, although the parties may live on the premises, if it is devoted partly to use as a saloon or soft drink place, or a *hotel* or any other than exclusively as a private dwelling, the maintenance of liquor there is not permitted under the law. Now that is the charge in the first count here."

This instruction is error, in that

a. It omitted in its definition of the offense of maintaining a common nuisance under the Act, one of the necessary ingredients, namely, that in order to constitute a building a common nuisance, intoxicating liquor must not only be *kept* therein, but also that such liquor must be kept for *sale* or *barter,* or other *commercial purposes.*

Sections 21 *and* 33, *Title II, National Prohibition Act.*
Street v. Lincoln Safe Deposit Co., 254 U. S. 88, p. 92.

b. It omitted the further condition that such liquor must be fit for use *for beverage purposes.*

Section 1, *Title II, National Prohibition Act.*

c. It instructed the jury that the first count of the information charged plaintiff in error with maintaining a common nuisance by keeping intoxicating liquor in a building where it is not permitted to be kept, and omitted material elements of such count, namely, that such liquor was kept *for sale* on such

premises (p. 3, record), and that it was *fit for use for beverage purposes* (p. 3, record).

d. It instructed the jury that where liquor is kept in a building or structure where it is not permitted to be kept under the Prohibition Act, the maintaining of it is deemed to be for *illicit* and *illegal* purposes and it constitutes what is denominated a common nuisance; whereas the first count charged plaintiff in error with keeping intoxicating liquor on said premises *for sale,* and for *no other* illicit or illegal purpose (p. 3, record); and the jury was not at liberty, under the information, to find that it was kept for any other purpose prohibited by the Act, nor to presume that it was kept for any purpose, other than for *sale.* The presumption that where liquor is possessed by any person not legally permitted to possess it, such liquor is kept for the purpose of being sold, is a rule of *evidence,* and not of *pleading.*

e. The Court, in giving said charge, instructed the jury that intoxicating liquor was *maintained* by plaintiff on said premises, and presumed to pass upon the question of fact that plaintiff in error *maintained* — in other words, *kept* — intoxicating liquor upon such premises, and there is no evidence that plaintiff in error, at any time, either maintained or kept intoxicating liquor thereon.

f. The Court in giving said charge, instructed the jury (p. 33), that any liquor that is maintained in a place which is not *exclusively* the residence, al-

though the parties may live upon the premises, if it is devoted *partly* to use as a saloon or soft drink place, or a hotel or any other than exclusively as a private dwelling, the maintenance of liquor there is not permitted under the law; such instruction is contrary to law.

Section 25, Article II of the National Prohibition Act provides:

"The term 'private dwelling' shall be construed to include the *room* or *rooms* occupied not transiently but *solely as a residence* in an apartment house, *hotel,* or boarding house."

The Court further charged the jury (pp. 35-37):

"It is true, as the United States Attorney suggests, that it is not necessary under this Act that it be shown that any positive sale or dispensation of liquor was going on at the time, provided it is shown that there was liquor maintained on the premises. Section 33 of the Act provides: 'After February 1, 1920, the possession of liquors by any person not legally permitted under this title to possess liquor shall be *prima facie* evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provisions of this title.' In other words, where liquor is found upon premises that are not of the character of those described in the Act as being such that people are entitled to keep liquor there, then that very fact raises the presumption and is *prima facie* evidence that it was there for an illegal purpose under the law. It is true that where one lives at a hotel or lives in a flat, or lives

in apartments, exclusively devoted to the purposes of residence he may keep and maintain liquors in those premises so occupied by him, but he is not at liberty to carry it out of those premises or take it out for the purpose of going somewhere else and enjoy it with his meals. The purpose of the law is to suppress the public consumption and maintenance of liquors that are prohibited under this Act so that the law shall not be subject to any pretense that it is being used under such circumstances solely for the use of the parties. If the defendant Traversi is testifying truthfully that he was taking this with him to some place where he was going to have his lunch he would be violating the law because if he maintained it in his private residence he would be entitled to have it there and serve his family there, but not permitted to take it off those premises."

This portion of the charge is error, in that: It instructed the jury that the rule found in Section 33 of the Act, that the possession of liquors by a person not legally permitted to possess liquor, is *prima facie* evidence that such liquor is kept for the purpose of being sold, is *conclusive* evidence of such fact, even though the evidence should show that such liquor was *not* kept for such purpose, but was to be used for some *other* unlawful purpose, not that of sale. It must be borne in mind that the *only* unlawful purpose plaintiff in error was charged, under the first count, with keeping the liquor in question, was that it was so kept by him *for sale*. (p. 3 record.)

A presumption of the existence of a fact cannot in itself possess probative weight, but merely necessitates evidence to meet the *prima facie* case which it creates; that when the function of a presumption of law sustaining the burden of evidence is ended by the introduction of rebutting testimony the presumption of law disappears, leaving in evidence the basic fact, which still retains its probative force and is capable of being weighed against other facts, and that a presumption of *fact* becomes inoperative when the actual facts are disclosed.

22 *C. J.* 156 Sec. 88.
2 *Chamberlaine on Evidence,* Sec. 1085, p. 1328.
4 *Wigmore on Evidence,* Sec 2491, p. 3534.
United States v. Ross, 92 U. S. 281, 23 L. Ed. 707, 709.
Lawson v. Mobile Electric Co., 204 Ala. 318, 85 So. 257, 259, 260.
State v. Adams, 22 Idaho 45, 126 Pac. 401, 402.
State v. Wilkerson, 164 N. C. 431, 79 S. E. 888, 890-892.

In discussing the effect of a statute that made the possession of a certain quantity of spiritous liquor *prima facie* evidence that it is held for the purpose of sale, the Supreme Court of North Carolina, in *State v. Wilkerson, supra,* (79 S. E. p. 890) says:

> "While the bare possession of so much may, in itself and as a fact, be innocent, it is yet made prima facie evidence of guilt under the

statute. * * * But it is only evidence, and while it has the added force or weight of being prima facie, the latter means no more than it is sufficient for the jury to convict upon it alone and unsupported, if no other proof is offered, but upon the whole evidence, whether consisting of the mere fact of possession or of additional facts, the jury are not bound to convict but simply may do so if they find beyond a reasonable doubt, or are fully satisfied that the defendant is guilty. Prima facie means at first; on the first appearance; on the face of it; so far as can be judged by the first disclosures, presumably. * * * The jury are no more required to convict upon a prima facie case than they are to acquit because of the presumption of innocence. They must judge themselves as to the force of the testimony and its sufficiency to produce in their minds a conviction of guilt."

In the same case (p. 891) the Court continues:

"It may therefore be taken as settled in this Court, at least, and we believe the same may be said of most, if not all, of the courts, that prima facie or presumptive evidence does not of itself establish the fact or facts upon which the verdict or judgment must rest, nor does it shift the burden of the issue, which always remains with him who holds the affirmative. It is no more than sufficient evidence to establish the vital facts without other proof, if it satisfied the jury. The other party may be required to

offer some evidence in order to prevent an adverse verdict or to take the chances of losing the issue if he does not, but it does not conclude him or forestall the verdict. He may offer evidence, if he chooses, or may rely alone upon the facts raising the prima facie case against him, and he has the right to have it all considered by the jury; they giving such weight to the presumptive evidence as they may think it should have under the circumstances. The defendant is not required to take the laboring oar and to overcome the case of the plaintiff by a preponderance of evidence is what we said in *Winslow v. Hardwood Co., supra,* and substantially the same thing was said in the other cases we have cited. This is undoubtedly the rule in civil cases, and it applies with greater force to criminal cases where the defendant has the benefit of the doctrines of reasonable doubt and the presumption of innocence. How can we say that prima facie evidence, or that which is apparently sufficient, excludes all reasonable doubt of guilt by its own force and overcomes the presumption of innocence? The bare statement of the proposition is sufficient to show its fallacy. It would destroy the presumption of innocence and take away the protection of the other rule as to reasonable doubt. The presumption of innocence attends the accused throughout the trial and has relation to every essential fact that must be established in order to estab-

lish his guilt beyond a reasonable doubt. *Kirby v. U. S.,* 174, U. S. 47, 43 L. Ed. 890. He is not required to show his innocence; the State must prove his guilt. No valid conviction can be had in law which is based solely upon prima facie evidence as conclusive and foreclosing the verdict, or which even casts upon the defendant the burden of showing his innocence by the greater weight of the evidence. We know of no such rule, and it finds no warrant in the language of the statute. The decisions are all the other way when rightly interpreted."

In *State v. Adams,* 22 Idaho, 45, 126 Pac. 401, the judgment of conviction was reversed by reason of the giving an erroneous instruction.

The Statute of Idaho provided that the finding of intoxicating liquors in the possession of a person at a place other than a private dwelling house shall be prima facie evidence that such intoxicating liquors are kept for sale. The trial judge instructed the jury that the statute provided that finding intoxicating liquors in the possession of a person at a place other than a private dwelling house shall be deemed sufficient to authorize a verdict of conviction for the offense, in the absence of evidence showing that such liquors were in the possession of the person for a lawful purpose; and further instructed the jury as follows:

"If, therefore, you should find from the evidence in this case, beyond a reasonable doubt, that intoxicating liquors were found at the place

of business of the above named defendant as alleged in the complaint, the burden of proof is on the defendant to prove that such intoxicating liquors were kept and used for an unlawful purpose, and in the absence of any such proof on the part of the defendant showing that such intoxicating liquor, if any liquor was found at his place of business, was kept and used for an unlawful purpose, then and in that event you should find the defendant guilty."

In holding the giving of this last portion of the instruction reversable error, the Court said:

"It is contended by the appellant that this instruction was clearly erroneous, and invaded the province of the jury, in telling them it was their duty to find the defendant guilty if they concluded beyond a reasonable doubt that intoxicating liquors were found at the place of business of the defendant as alleged in the information. This instruction was clearly erroenous. Where a statute provides that, upon a certain fact being shown, certain other presumptions of law arise, or where, as in this case, where one fact is shown, namely, the possession of the intoxicating liquors, that such fact is 'prima facie evidence that such intoxicating liquors are kept for sale,' etc., the statute means that such prima facie presumption or prima facie evidence is sufficient to go to a jury to prove such fact, and that it will be sufficient to support a verdict. It does not mean, however, and so far

as we are aware, has never been held by any of the courts, that it is the duty of a jury to take such prima facie evidence or presumption as conclusive, and that they must render a verdict accordingly. Such statutes are enacted for the purpose of shifting the burden of proof; but if the adverse party does not see fit or deem it necessary to rebut the presumption in any given case, he may have the matter submitted to the jury, and they must be given the right and privilege of exercising their judgment as jurors upon the weight, sufficiency, and credibility of the evidence and the attendant circumstances of the case. A court is not justified in telling the jury it is their duty to convict simply because a prima facie presumption arises or that the proof of one fact is made by the statute prima facie evidence of the existence of another essential fact."

Said portion of the charge is also erroneous in that the jury was thereby instructed that even though "if the defendant Traversi is testifying *truthfully* that he was *taking* this with him to some *place where he was going to have his lunch* he would be *violating the law.*"

By this portion of the charge, the Court instructed the jury, at least inferentially, that so far as the issue as to whether or not plaintiff in error kept the intoxicating liquor on the premises, *for sale,* was concerned he was neither entitled to the doctrine of the

presumption of innocence, nor to that of reasonable doubt.

A man *lawfully* in the possession of liquor, which he keeps in a place permitted under the law, has the *absolute right* to remove such liquor from *that* place to some *other* place at which the law gives him the right to consume it.

> *Street v. Lincoln Safe Deposit Co.,* 254 U. S. 88, 93; 65 L. Ed. p. 154.

In the case last cited, the Supreme Court held that when a person has liquor lawfully stored in a place over which he has the exclusive control, it is not unlawful for him to transport or remove such liquor to his permanent residence for the purpose of consuming it there.

So, when the plaintiff testified that he was taking the wine to some place to have his lunch, or—as stated by the Court—"to enjoy it with his meal," the presumption of innocence and the doctrine of reasonable doubt should be invoked in his favor; and he was entitled to have the jury determine, first, whether the liquor was being removed by him from one place where he had the legal right to store it, and secondly, whether it was being taken to another one where, under the law, he had the right to consume it, and when the Court instructed the jury that "the possession" by plaintiff in error of the wine was "not justified" (p. 34, record) and that he "would be violating the law" by taking it to some place where he was going to have his lunch" (p. 36, record), he was deprived of his constitutional rights

to have these facts determined by the jury, and also of his right to have the jury give him the benefits of the presumption of innocence and of the doctrine of reasonable doubt.

The Court also instructed the jury (p. 33, record):

> "The second count is that on the same date the defendants had in their possession the liquor that is charged here as having been taken from the defendant Traversi. This quart of red wine. Now possession, of course, you all understand what that means. It means either having it in your hands, your pockets or *on premises* immediately under your control. That is in law, in your possession and the defendants are charged with having this liquor in their possession and under circumstances which are not warranted under the Act."

This portion of the charge is also erroneous, for several reasons.

First. It informed the jury that plaintiff in error was charged with the "possession" of the liquor. It is true that such is the nature of the charge in the second count; but when the Court so informed the jury, it virtually said that mere "possession" of intoxicating liquor is an offense under the National Prohibition Act—an incorrect construction of the Act, as has been heretofore demonstrated.

Secondly. It instructed the jury that plaintiff in error had in his possession a *quart* of red wine. This instruction as to the facts is not warranted either by the information nor by the evidence. The charge

THE CONVICTION OF PLAINTIFF IN ERROR UPON BOTH COUNTS OF THE INFORMATION WAS ILLEGAL, FOR THE REASON THAT THEY WERE EACH BASED UPON THE SAME FACTS, EACH CHARGING PLAINTIFF IN ERROR OF AN OFFENSE ARISING OUT OF HIS POSSESSION OF THE SAME LIQUOR AT THE SAME TIME, AND THE COURT HAD NO JURISDICTION TO SENTENCE HIM UPON BOTH.

As already pointed out, the only evidence connecting plaintiff in error with the possession of intoxicating liquor was that on the day mentioned in the information he entered the door with a bottle of wine in his hands. It is this same bottle of wine that he is charged with "keeping on the premises 115 I Street for sale," and also with "possessing" unlawfully; consequently, both counts being based upon the same identical facts, namely the possession of the same Qt. bottle 1/3 full of the same red wine, a conviction on one count would entitle him to an acquittal on the other, as having been once in jeopardy; and the Court was without jurisdiction to sentence him on both. This is ground for a reversal of the judgment.

Ex parte Nielsen, 118 U. S. 176, 188; 33 L. Ed. 118, 120.
Reynolds v. United States, 280 Fed. 1, 3, 4.
Rossman v. United States, 280 Fed. 950, 953.

The point above urged is also given in the assignment of errors.

THIS COURT MAY AND SHOULD CONSIDER AND CORRECT THE ERRORS PRESENTED HEREIN.

In a criminal case, when the liberty of a defendant

is at stake, the Appellate Court, in the interest of justice, will and should consider plain error *vital* to the defendant, notwithstanding such questions were not presented to the trial Court, by demurrer, motion in arrest of judgment, or exception to the instructions; and even though such questions were not presented to the Appellate Court itself, and such error was not assigned.

Supreme Court rule 35.

Circuit Court of Appeals rule 24, *sub.* 4.

Wiborg v. United States, 163 U. S. 632, 658; 41 L. Ed. 289, 298, 299.

Weems v. United States, 217 U. S. 349, 362; 54 L. Ed. 793, 796.

Patten v. United States, 42 Appeal D. C. 239, 247.

Humes v. United States, 182 Fed. 485 p. 486.

Pettine v. Territory of New Mexico, 201 Fed. 489, 497.

Felder v. United States, 227 Fed. 832, 833.

McNutt v. United States, 267 Fed. 670, 672.

Rossman v. United States, 280 Fed. 950, 953.

Felder v. United States, 255 Fed. 205, 284.

In *Wiborg v. United States,* 163 U. S. 632, and *Felder v. United States,* 227 Fed. 832, the Court, in each instance, considered and examined the evidence in order to ascertain whether there was any substantial evidence against the defendant, notwithstanding no motion was made on that ground. In doing so, the Supreme Court in the Wiborg Case, gave the following reason for so doing:

> "No motion or request was made that the jury be instructed to find for the defendants or either of them. Where an exception to a denial of such a motion or request is duly saved, it is open to the Court to consider whether there is any evidence to sustain the verdict, though not to pass upon its weight or sufficiency. And although this question was not properly raised, yet if a plain error was committed in a matter so absolutely vital to the defendants, we feel ourselves at liberty to correct it."

In *Patten v. United States,* the Court of Appeals of the District of Columbia considered the instructions of the lower Court, although no exception had been taken to the charge.

In *Weems v. United States,* the Supreme Court considered questions of law not included in the assignment of errors; and referring to Supreme Court rule 28, invoked by the Assistant Attorney General, said (217 U. S. p. 362):

> "But the rule is not altogether controlled by precedent. It confers a discretion that may be exercised at any time, no matter what may have been done at some other time. It is true we declined to exercise it in *Paraiso v. United States,* but we exercised it in *Wiborg v. United States,* 163 U. S. 632." * * *

After again referring to its failure to consider the questions involved in *Paraiso v. United States,* the Court continued:

"It may be that we were not sufficiently impressed with the importance of these contentions, or saw in the circumstances of the case no reason to exercise our right of review under rule 35. As we have already said, the rule is not a rigid one, and we have less reluctance to act under it when rights are asserted under it which are of such high character as to find expression and sanction in the Constitution or Bill of Rights."

In *Rossman v. United States,* 280 Fed. 950, the Circuit Court of Appeals for the Sixth Circuit considered a question, which it deemed vital to the plaintiff in error, that had not been presented by him either in the trial Court or in that Court; and in *McNutt v. United States* 267 Fed. 670, the Circuit Court of Appeals for the Eighth Circuit considered questions raised upon appeal, and reversed the judgment of the lower Court, although at the trial no exceptions were made to any rulings of the Court or any exceptions taken to the testimony. In deciding that the questions should be considered, the Court said (p. 672):

"The United States Attorney meets his" (counsel for plaintiff in error) "brief and argument with the objection that because there were no objections or exceptions to any of the evidence, or any of the rulings of the Court at the trial, there is nothing here for this Court to consider or review and the judgment must be affirmed. Such is undoubtedly the general

> "No motion or request was made that the jury be instructed to find for the defendants or either of them. Where an exception to a denial of such a motion or request is duly saved, it is open to the Court to consider whether there is any evidence to sustain the verdict, though not to pass upon its weight or sufficiency. And although this question was not properly raised, yet if a plain error was committed in a matter so absolutely vital to the defendants, we feel ourselves at liberty to correct it."

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rule, but there is an exception to it as firmly established as the rule itself. It is that in criminal cases, where the life or liberty of the citizen is at stake, the Courts of the United States, in the exercise of a sound discretion, may notice and relieve from radical errors in the trial which appear to have been seriously prejudicial to the rights of the defendant, although the questions they present were not properly raised or preserved by objection, exception, request or assignment of error."

It is true that in *Cabiale v. United States,* 276 Fed. 769, this Court refused to consider instructions to which no exceptions had entered; but a reading of the opinion seems to indicate that the objection made in this Court to the charge were merely to some general observations contained therein, which apparently did not effect the fundamental rights of the plaintiff in error therein.

Plaintiff in error, in the light of what was said by the Supreme Court in *Weems v. United States,* submits that the decision of this Court in *Cabiale v. United States,* is not *stare decisis,* and respectfully requests the Court not to treat it as such.

Included in the errors, vital to plaintiff in error, the Court is asked to consider are:

1. There is *no* evidence to sustain a conviction upon the first count, namely, maintaining a common nuisance.

As this is the only count of the information for which a punishment of imprisonment could be

imposed, namely, imprisonment for not more than one year (Section 25 of the Act), the penalty for the unlawful possession of intoxicating liquor, if it be the first offense, being limited to *fine* only (Sec. 29 of the Act), it follows, that if this point be sound, the rights of plaintiff in error would be indeed *vitally* affected, should the Court refuse to consider the same.

2. The second count of the information states no offense whatever; and the Court has no jurisdiction to render a judgment upon a conviction thereunder.

3. The Court instructed the jury that evidence showing that plaintiff in error did *not* keep the intoxicating liquor for the purpose of sale, *even though true,* would not prevail over the *prima facie* presumption that it was kept for such purpose.

5. The Court instructed the jury that they might *presume* plaintiff in error had committed offenses under the Act other than those set out in the information, notwithstanding no evidence regarding any prior offenses was adduced at the trial.

6. Plaintiff in error was convicted and sentenced upon two counts, both of which were based upon the same facts, and the Court had no jurisdiction to sentence him upon both.

The judgment should be reversed, and a new trial granted.

Respectfully submitted,

R. PLATNAUER,

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